TAN SOOI SHIN

v.

KOW KEK HING (2)

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[COMPANIES WINDING-UP NO. D3-28-493-89]
14 JUNE 1990

COMPANY LAW: *Petition for winding-up - Just and equitable - Two shareholders only - Equal shareholding - Deadlock - Lack of trust and confidence - Application of partnership law - Management of company - Whether 50% shareholder meant that was co-managing director - Memorandum and articles of association - Companies Act 1965, s. 218 (10)(i).*

The petitioner P, one of the two shareholders of the company TC brought a petition under s. 218(1)(i) of the Companies Act 1965 (the Act) for the winding up of TC on the ground that it was just and equitable to wind up TC as there was a state of deadlock in respect to the management of TC and that the relationship of trust and confidence between the directors had completely broken down. The petition is opposed by the other shareholder K who submitted that the situation was not a deadlock situation and further, that P had not come to Court with clean hands.

Held:

[1] The evidence indicates that some time after the companies had been incorporated, the Kuala Lumpur company was managed by P and that K had allowed such a state of affairs to exist. There was obviously mutual trust and confidence to the extent that K used to sign and leave blank cheques for P to use in respect of the business of the Kuala Lumpur company. In the context of the mutual trust and confidence the parties had intended that as at all relevant times K was resident in Singapore and P in Kuala Lumpur, the situation that eventually resulted was that TC was "primarily managed" by P and the Singapore company by K.

[2] A look at the draft sale and purchase agreement for the purchase of P's shares, prepared on the instructions of K, suffices to demonstrate that the sale was far from complete upon the acceptance of the offer by K.

[3] As to K's misconception that because he was a 50% shareholder he was a co-managing director, there were no such provisions in the memorandum or articles of association; if there were, they had not been invoked.

[4] As there was no reference to any resolutions that P was in charge of the management of the Kuala Lumpur company and as there was no agreement for K to function either as managing director or even a co-managing director, the management of the company had to continue in P's hand. That being the case K holding himself out as managing director or even as managing director was an improper usurpation. This misconception of the position on the part of K that is primarily responsible for the situation of complete deadlock which resulted.

[Petitioner's application granted.]

Cases referred to:

Ebrahimi v. Westbourne Galleries Ltd. [1972] 2 All ER 492
Lock v. John Blackwood Ltd. West Indian Court of Appeal (Barbados)
Re Yenidje Tobacco Co. Ltd. [1916] 2 Ch 426

Legislation referred to:
Companies Act 1965, s. 218(1)(i)

For the petitioner - P. Abraham; M/s. Abraham & Partners
For the other applicant - Dato' Vadiveloo (Stanley Chang with him); M/s. Shui Tai & Associates

JUDGMENT

VC George J:

This is a petition to have Tako Corporation Sdn. Bhd. wound up. It is brought by one of the only two shareholders of the company. It is brought under s. 218(10)(i) of the Companies Act the petitioner Tan Sooi Shin claiming that it is just and equitable that the company be wound up. The petition is opposed by the other shareholder Kow Kek Hing. The two shareholders are equal shareholders and are the only two directors of the company.

The petitioner contends that there is a state of deadlock in respect of the management of the company and that in any even there has been a complete breakdown of trust and confidence between the directors with no hope of reconciliation. Further in effect it is urged that the analogy of partnership law is relevant in that the two shareholders are really partners and that the company is for all real intents a partnership in the guise of a company. The ratio in *Ebrahimi v. Westbourne Galleries Ltd.* [1972] 2 All ER 492 as stated by Lord Wilberforce at p. 497 was relied on:

> In England, the leading authority is the Court of Appeal's decision in *Re Yenidje Tobacco Co. Ltd.* This was a case of two equal director shareholders with an arbitration provision in the articles between whom a state of deadlock came into existence. It has often been argued, and was so in this House, that its authority is limited to true deadlock cases, I could, in any case, not be persuaded that the words 'just and equitable' need or can be confined to such situations. But Lord Cozens Hardy MR clearly puts his judgment on wider grounds. Whether there is deadlock or not, he says:
>
> > the circumstances are such that we ought to apply, if necessary, the analogy of the partnership law and to say that this company is now in a state which could not have been contemplated by the parties when the company was formed.
>
> Warrington LJ adopts the same principle, treating deadlock as an example only of the reasons why it would be just and equitable to wind the company up.
>
> In 1924 these authorities were reviewed, approved and extended overseas by the Judicial Committee of the Privy Council in an appeal from the West Indian Court of Appeal (Barbados), *Lock v. John Blackwood Ltd.* The judgment of the board delivered by Lord Shaw of Dunfermline clearly endorses, if not enlarges, the width to be given to the just and equitable clause. The case itself was one of a domestic company and was not one of deadlock. One of the directors had given grounds for loss of confidence in his probity and (a matter echoed in the present case) had shown that he regarded the business as his own. His Lordship quotes with approval from the judgments of Lord M'Laren in *Symington v. Symington* and Lord Cozens-Hardy Mr. in *Re Yenidje Tobacco Co. Ltd.* [1916] 2 Ch. 426.

The main thrust of the contention of En. Kow and his legal advisers was that the situation that the parties found themselves in is not a deadlock situation and that in any event, that matters had come to this pass, is the fault of the petitioner and that accordingly he does not come to this Court with this petition with clean hands and the petition accordingly should not be entertained. Counsel referred to p. 430 in *Yenidje Tobacco Co. Ltd.* cited in *Ebrahimi*, where the Master of the Rolls quoted from Lindley on Partnership:

> Refusal to meet on matters of business, continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation have been held sufficient to justify a dissolution. It is not necessary, in order to induce the Court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the Court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it.

Tako Corporation Sdn. Bhd. was incorporated on 27 June 1979. The paid up capital is RM500,000 represented by 500,000 RM1 shares - each shareholder holds 250,000 fully paid up shares.

According to En. Kow when the company was incorporated Tan was working for Olivetti (M) Sdn. Bhd. and continued to do so for some time after the said incorporation. A Singapore company had also been incorporated also owned by Kow and Tan in equal shares. Kow claims to have got both companies on their feet and it was only after that, that Tan resigned from Olivetti to work full time for the companies.

According to Tan it got to a stage that the Malaysian company was managed by him and the Singapore company by Kow. Kow's comment in response to that was that he wished to state:

> that although the company in Kuala Lumpur was primarily managed by the petitioner and the Singapore office by me, there was no agreement between the petitioner and I that the petitioner shall have sole and exclusive management of the company in Kuala Lumpur.

I pause to note that further by para. 8 of the affidavit encl. (25) Kow in fact concedes that control of the Kuala Lumpur company passed from him to Tan owing to his commitment to develop the Singapore company.

The concession by Kow that the company in Kuala Lumpur was primarily managed by Tan read together with Kow's note dated 15 August 1989 to Tan (Exhibited to the petition) suggests to me that I have to hold as I do that some time after the companies had been set up in Kuala Lumpur company was indeed managed by Tan and that Kow allowed such a state of affairs *vis-a-vis* Kuala Lumpur to exist in that he did not even have access to the company's safes. There was obviously mutual trust and confidence to the extent that Kow used to sign and leave blank cheques for Tan to use in respect of the business of the Kuala Lumpur company. In the context of the mutual trust and confidence the parties had and having in mind that at all relevant times Kow was resident in Singapore and Tan in Kuala Lumpur, it is not surprising that the situation that eventually obtained was that (to use Kow's words) Kuala Lumpur was "primarily managed" by Tan and Singapore by Kow.

Tan's wife Patricia Boo was employed by the Kuala Lumpur company and was a member of its management team. Kow refers to her as the general manager of the company in encl. (15). Tan says that she played such an effective role in the company that the two owners of the company. Tan & Kow jointly guaranteed her a percentage of the profits of the two companies. The written letter of guarantee is dated 29 June 1988 and is Exh. A to the petition.

Kow denied that the guarantee of a percentage of the nett profits to Patrica Boo was because her involvement in the Kuala Lumpur operations was fruitful and/or that it benefited the Singapore operations as well. He purports to give an explanation in paras. 8 and 9 of his affidavit encl. (25) for his having executed the letter of guarantee:

> The truth is that my control over the Kuala Lumpur company was gradually eroded owing to my commitment to develop the Singapore company. I also accommodated the petitioner as much as possible in order to preserve the goodwill and maintain amicable relationship between the petitioner and myself. I therefore grudgingly signed the letter of guarantee.

> I beg to point out that although the letter of guarantee was ostensibly to give the petitioner's wife, an employee only of the Kuala Lumpur company, incentives to continue to work for the company as alleged, it was in effect a device by both the petitioner and his wife to reduce my share of the profits from the Kuala Lumpur company.

To give such a guarantee to an employee is odd to say the least. It is to be noted that Kow does not contend that his consent to the guarantee was not free. Kow is not saying that his consent to it was as a result of coercion, undue influence, fraud and the like. I also do not see the nexus between lack of control over the Kuala Lumpur company and his executing the letter of guarantee. I have to conclude that the guarantee was given to Patrica Boo for the reasons stated in the letter of guarantee:

> In consideration of (her) contributions in the development of Tako Corporation Sdn. Bhd. and Tako Technology (S) Pte. Ltd.

Presumably her contribution must have increased the quantum of profits made by the two companies and even if it did not, I fail to see merit, not to speak of sense, in Kow's complaint that the guarantee was for the purpose of having his share of profits reduced.

Now in para. 8 of encl. (25) Kow says that he signed the letter of guarantee to accommodate the petitioner to preserve goodwill and amicable relationship but in the next breath in para. 10 somewhat inconsistently he refers to the obtaining of the letter of guarantee as a manifestation of the petitioner and his wife's greed!

The letter of guarantee was given, as has been seen, on or about 29 June 1988. The next incident relevant to the relations (or the lack of it) between the parties that has been brought to the attention of the Court occurred about a year later. According to Kow, Tan and his wife had insisted in Tako Corporation Sdn. Bhd. buying out Patricia Boo's holdings in a company called Usamal because it was running at a loss. Kow (it seems to me with justification) objected to this unfair requirement. There must have been some argument about this which appeared to result in Kow calling for what he described as a public debate. That was on 7 August 1989. Whether the "public debate" took place is not clear but according to Kow, his objecting to the unfair proposal in respect of Patricia Boo's Usamal shares so infuriated her that she abused Kow and physically attacked him and assaulted him. This was on or about 15 August 1989 as can be seen from Kow's copy of the police report he had lodged. With that attack on him Kow became, to use his own words, "extremely cautious and suspicious of both the petitioner and his wife".

What transpired after that can be gathered from the affidavits of both Kow and Tan and the exhibits thereto.

On 6 September 1989 Kow referring to himself using the acronym "M.D." in a handwritten "memo" addressed to Patrica Boo purported to give her certain instructions including prohibiting her from visiting any of the company's customers and from having her name on any official communication made by the company to its customers. This was followed by another "memo" again by Kow describing himself as "managing director" by which he purports to "transfer" her to work in Singapore. The memo ends with a provision that in the event she fails to confirm acceptance of his order of transfer of her employment from Kuala Lumpur to Singapore it would be deemed that she had voluntarily resigned her employment "from the company". This was written on the letterhead of Tako Corporation Sdn. Bhd. and "the company" no doubt has reference to Tako Corporation Sdn. Bhd.

Patrica Boo came back with her letter of 19 September 1989 addressed to the board of directors of Tako Corporation Sdn. Bhd. contending that the requirement that she goes to work in Singapore for another corporation tantamounts to unlawful dismissal from her employment with Tako.

On 18 September 1989 Tan sent a memo to Kow copied to all the staff of Tako (Exhibit KKH2 to encl. (25)):

> It is our understanding that I am in charge of the Malaysian operation and you are in charge of the Singapore operation with no interference on the management of the respective operations. Therefore your requests from the Malaysian staff would not be complied.
>
> c.c. Staff or Tako Corporation Sdn. Bhd.

Kow came back with his reply by way of a memo to the staff (Exhibit F to encl. (1)):

> As an equal shareholder and a director of the company, I am legally entitled to manage and administer the operation of both the Malaysian and Singaporean companies irrespective of any alleged understanding Mr. S.S. Tang and I may have.
>
> Therefore, kindly ignore the memo from Mr. S.S. Tang dated 18 September 1989 which was copied to you. Kindly continue with your duties expeditiously as you will have my full support.
>
> Sd.
> Managing Director
> Albert Kow
>
> c.c. Mr. S.S. Tang.

In the meantime he had sent his note of 15 August 1989 which has been earlier referred to herein. In that it is perhaps significant that he does not describe himself as "M.D." or "managing director" it seems to me that he assumed the mantle of managing director only after his quarrel with Boo.

There was an attempt to resolve the differences between the partners. Tan offered to buy out Kow. Kow rejected the offer and in turn offered to buy out Tan on terms set out in the document which is Exhibit J to encl. (1). An understanding was arrived at on this offer. The purchase price was RM887,000 to be paid RM300,000 within 2 weeks of signing of the sale and purchase agreement, RM200,000 within 2 months of date of agreement and the balance in certain monthly instalments. *Inter alia* it was a term that all documents pertaining to the purchase of the shares were to be executed by the parties and held by their respective lawyers as stakeholders until completion of the deal, the understanding to be subject to a sale and purchase agreement to be entered into.

The acceptance of Tan's offer was made at the meeting of the board of directors of the company on 13 October 1989. The acceptance was effected with Kow tendering a bank draft for RM10,000 held out to be a deposit. Tan appeared to accept that there was a concluded contract but refused to accept the RM10,000. He asked Kow when the draft sale and purchase agreement would be ready and Kow said it would be furnished within 14 days. The meeting proceeded in respect of at least one other item on the agenda and eventually was terminated.

Thereafter on the same day the evidence provided by the affidavits suggest that Kow purported to physically take over the company. He brought in 8 persons not employees of the company into the company, changed the locks to the premises, put on security guards

one of whom actually prevented the petitioner from entering the premises on the day following the meeting of 13 October 1989 and Kow subjected Tan to the humiliation of wanting him to declare the contents of his brief case when Tan attempted to leave the premises. The petitioner says that in fact he was subjected to a body search. Kow says it was only a verbal request to Tan "to discuss the contents of the petitioner's brief case." He submits in his affidavit that this line of action by him was reasonable because he had seen the petitioner's wife "carrying a medium-sized yellow bag into the petitioner's room and thereafter the window blinds .. were dropped preventing and blocking my view."

I think that Kow laboured *inter alia* under two misconceptions - one was that because he was a 50% shareholder he was at least a co-managing director and that upon his accepting the offer to take up Tan's 50% interest he had become the sole owner of the company or that he could thereafter run the company as if he was the sole owner.

As to the latter of the two misconceptions, a look at the draft sale and purchase agreement prepared on the instructions of Kow suffices to demonstrate that the sale was far from complete upon the acceptance of the offer by Kow "subject to contract" which it was. Clause 2 of the draft agreement provides for the purchase of RM887,000 to be paid, RM10,000 on signing the agreement, RM300,000 within 2 weeks thereof and another RM200,000 within 2 months of the agreement and the balance in 7 monthly instalments of RM50,000 each and a final instalment of RM27,000. Upon execution of the agreement there would forthwith be registration of the vendor's shares in favour of the purchaser such new share scripts to be held by the purchaser's solicitors until full payment is effected - which provision was inconsistent with Tan's offer and could be said to be odd but not startling. However there comes the startling clause 12 of the draft agreement which could be said to be illuminative of the mind of Kow. I reproduce it in toto:

> 12. In the event the purchaser is unable to raise the funds to satisfy the payment of the purchase price as stipulated in clause 2 herein, the vendor shall be entitled to terminate this agreement and shall forfeit a sum of RM10,000 as agreed liquidated damage and the vendor shall refund to the purchaser the excess monies already paid to the vendor and this agreement shall be null and void and of no effect and the parties hereto shall have no further claims against the other whatsoever.

Kow accepted that at any time before the full payment is effected (and payment was to be effected over 10 months) if he was unable to raise sufficient funds to meet the agreed payments the vendor was entitled to terminate the agreement. However upon doing so, all that the vendor could retain as damages for breach of contract was to be RM10,000 and all other payment effected was to be refunded to Kow and presumably thereafter Kow would be back as 50% shareholder! Tan's offer and its acceptance does not provide the time of the take over of the company by the petitioner. Until agreement on that was arrived at, Kow's purported take over and take over it certainly was, and the manner in which it was done, was impudent and premature to say the least. Tan was to be locked out. His shares were to be forthwith transferred to Kow and there was a possibility that after Kow had run the company for say 7 or 8 or even 9 months after the execution of the agreement, he could return the 50% interest in the company to Tan, with Tan having to refund all amounts paid to him save RM10,000!

As to the former of his misconceptions, that because he was a 50% shareholder he was a co-managing director, since the provisions, if any, in the memorandum and articles in respect of appointment of managing director had not been referred to by either side, I will assume that there were either no provisions in respect thereof or that if there were they had not been invoked.

As has been seen there is evidence and even an admission by Kow that some time after incorporation the management of the company in Kuala Lumpur passed on to Tan. For any change of such a management there had to be either agreement between the parties or suitable resolutions at either board or general meeting level. Since no reference has been made to any such resolutions I take it there were none. And quite clearly there had been no agreement for Kow to function either as managing director or even a co-managing director. In the circumstances the management of the company had to continue in the hands of Tan. That being the case Kow holding himself out as managing director or even as co-managing director was an improper usurpation. As I have said earlier he had a misconception of the position and it seems to me that it was that misconception on the part of Kow that is primarily responsible for the situation that came to obtain being what it was. In my judgment that situation amounts to a complete deadlock. From the time, going by Kow's own affidavit, that Patrica Boo was rude to him in or about August 1989 Kow acted under the said misconception of his rights and as a result inevitably there came about what can only be described as a deadlock. It was almost resolved but Kow's premature taken over of the company and the manner in which it was done, it seems to me were factors that were primarily responsible for putting paid to that.

I cannot help observing that it would seem that these two parties to the action appear to be cutting their own noses to spite their own faces. But they are grown men and they have the freedom to do and act as they please so long as it is within the law even if it is stupid. The noses are theirs and the faces are theirs.

In my judgment, with the finding of deadlock and in any event applying the ratio in *Ebrahimi v. Westbourne Galleries*, it is eminently just and equitable that Tako Corporation Sdn. Bhd. be wound up. The necessary orders to effect that were made.

Also found at [1991] 3 CLJ 1898